acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property and who took it in good faith and for value.....If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfer property, 'he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of encumbrance or adverse equity,' and he cannot be heard to say that he has not in fact received such purchase money."

In their Lordships' opinion the principle underlying this passage is equally applicable to the present case, in which the beneficial owner of the premises has represented that some one else, being the owner thereof, has assigned them to a third person in consideration of a sum of money paid by the third person to and received by the alleged assignor.

It was argued, however, that no estoppel grounded on any representation made by the appellant before she took out letters of administration could bind her as administratrix; and certain authorities were cited in support of that proposition. Whatever true position might have been had she been suing to recover the premises for the benefit of persons other than herself, the present case is not that case. Her husband has been dead many years, there is no suggestion of any outstanding debts for the payment of which the premises have to be realised or indeed of any outstanding debts at all; provision has been made by security for the payment of the estate duty; the only person concerned in the recovery of the premises, or interested in asserting the falsity of her representations, is the appellant herself. In these circumstances their Lordships feel no doubt that she is effectually bound by estoppel.

It was further suggested that Yan Pun was in some way affected with notice of the lack of title in Li Kai Loy from the absence of the title deeds, and from the fact that, as appears from the evidence, Yan Pun was warned that he ran some risk in lending money on mortgage of property without obtaining the title deeds. The risk which he ran was the risk of some adverse title being or having been established which originated in a deposit of those deeds with some third party for valuable consideration. This was a risk which he might run if he chose, and one the existence of which in no way suggested or implied any flaw in the title disclosed by the entries in the register. He was, their Lordships think, entitled in the circumstances to rely on the statutory declaration, which was entered on the register, as a true explanation of the reason why the title deeds were not forthcoming and also if he thought fit to run the risk indicated above. That risk did not in fact mature for the appellant's claim is not founded on possession of the title deeds.

For the reasons appearing herein their Lordships are of opinion that this appeal fails and should be dismissed; and they will humbly advise His Majesty accordingly. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors: *Darley Camberland & Co.; Sharp Pritchard & Co.*

[30] STEAMER "PHILIP DODGE" v. DOMINION BRIDGE CO., LTD. & ORS. [30]

[P.C. (Lords Atkin, Tomlin, Russell of Killowen, Alness and Sir Sidney Rowlatt) July 30, 1935]

[Privy Council Appeal No. 24 of 1935]

Collision — Alleged negligent helm action — Negligence not pleaded nor raised at trial — No trace of plea in judgment — Practice — Whether new plea that negligence is presumed from circumstances of case can be raised on appeal.

In a case of collision in which negligent helm action was imputed to the navigating officer, the plea of negligence was not set up in the pleadings nor raised at the trial. The evidence adduced did not support such a plea although the opposite party had an opportunity of cross-examining the witnesses on the point, nor was it discernible in the judgments of the lower Courts.

Held: that a new plea that negligence was presumed from the circumstances of the case could not be raised on appeal.

The judgment of their Lordships was delivered by —

Lord Atkin: This is an appeal from the judgment of the President of the Exchequer Court of Canada dismissing an appeal from the local Judge in Admiralty for Quebec in favour of the plaintiffs, the present respondents. The respondents are the builders and owners of a bridge across the York River at Gaspe in the Province of Quebec. The claim in the action is based upon the allegation that the defendant vessel when passing under the bridge collided with it and carried away one of the bascules owing to the negligent navigation of those on board. Of the fact of the collision and of the damage there is no dispute. The question arises on an issue of negligence. The bridge, which was in the course of construction at the time of the collision, connects Gaspe Harbour with Gaspe village, running about north and south over a distance of about 770 feet. It consists of four spans and what is called in the proceedings a draw fitted with two bascules which are raised for the passage of ships. On the day in question, 6th July, 1932, the bridge had not been completed: the northern bascue alone had been fitted and was in operation. The defendant vessel, the *Philip T. Dodge,* is a single-screw steamship 5,047 tons gross and 3,691 tons net register, 400 feet in length with a beam 51 feet 7 inches. Her speed is 9½ knots. She was proceeding in ballast to a wharf on the west or upper side of the bridge lying on the south side of the harbour: her draft was 9 feet 10 inches forward and 14 feet 9 inches aft. Her master had been in command of her for about 11 years, had taken her into Gaspe several times before: but not since the bridge had been constructed.

The master had arrived in the vicinity overnight: had anchored for the night, and in the morning taking a local fisherman on board as pilot proceeded to his destination. The tide was about an hour and a half after the flood, and was running out, i.e. against the steamer at one knot. Ten minutes before the accident the ship's engines were put at half speed, and in another five minutes at slow. To negotiate the bridge the captain took the wheel himself: he had the chief officer on the bow and the second officer on the poop. The width of the draw was 90 feet: so that on the

waterline the vessel had a possible clearance of 20 feet on either side: but the bascule when raised overhung the water slightly, and the margin was in fact slightly less. When about two-thirds of the vessel had emerged from the bridge her starboard quarter came into collision with the bridge and brought down the bascue. According to the captain the "stern swung to the north." The chief officer said: "Her stern began to sag towards the north." The second officer, "the ship's stern went right in on the bridge." They all agreed that to avoid collision the captain hard a ported. They attribute the collision to the effect of a northerly current setting the ship or the ship's stern towards the north side. The ship sustained no serious damage and made her way to the wharf which was her destination.

The plaintiffs commenced the action on 7th September, 1932, and by the statement of claim dated 28th December, 1932, alleged that the collision was caused by the negligent navigation of those on board and gave particulars of negligence under eight heads. The defendants denied negligence, and averred inevitable accident: and alleged that the bridge itself was wrongfully constructed and a public nuisance. The last allegation, though fought at the trial, was not persisted in on appeal. In giving judgment the trial Judge negatived the defendant's attack on the bridge. He then proceeded to discuss "the second point: was there any negligence to be imputed to the defendant?". He came to the conclusion that the master should have stopped his ship before entering the bridge and made himself acquainted with the conditions. He would not then have navigated with such speed. The Judge found that the master entered the gap in the middle, but for fear of striking Davis wharf 800 feet ahead, he put his helm to starboard and also to counteract the effect of the current to northward. He says that the current striking the bow of a ship to the northward could not push the stern to the northward but to the southward. He therefore pronounced a decree in favour of the plaintiffs.

[31] [31] Their Lordships find themselves somewhat embarrassed by the absence in the judgment of those precise findings which are now usually found in all judgments in Admiralty cases, as to course, speed, state of tide, location of damage and so forth. In particular the learned Judge does not express what he means by "such speed," though he seems to find it excessive. On appeal the President negatived any negligence in not stopping to examine the conditions, a decision with which their Lordships agree. He accepted the ship's speed as four miles per hour, presumably nautical miles: but he finds that speed excessive in view of the fact that the Davies wharf was in line with the ship's course through the draw, and only two ships' lengths away from the western side of the bridge. The President then proceeds:

> "When the *Dodge* was two-thirds through the bridge opening, the master put his helm to starboard, which had the effect of putting the ship's stern to starboard, thus causing, I think, the collision and the damage complained of. This movement, I agree with the learned trial Judge, was executed because of fear of coming into collision with the Davies wharf. One can quite understand such a movement, but it was an error, and was, I think, thought to be necessary because of fear, or the imminence of colliding with the Davies wharf, but that fear or imminence arose, I think, because of the excessive speed of the ship in passing through the bridge draw. Had the speed been reasonably reduced I do not think the liability of contact with the Davies wharf would have been so apparent, and would not have occasioned the fatal order of 'helm to starboard,' and without this I think the *Dodge* would have passed through the draw without any mishap. And that conclusion as to the speed of the *Dodge* in passing through the bridge contains the answer to the contentions that the master of the *Dodge* navigated his ship with reasonable care, and that the accident was inevitble."

It appears therefore that both the trial Judge and the President have found that the collision was due to negligence of the master in proceeding at an excessive speed of four knots, and while at that speed and while still partly under the bridge negligently starboarding the helm so as to avoid the wharf about 530 feet ahead. The speed alone did not harm, but it was the fatal order of helm to starboard without which no damage would have been done. On this view of the case their Lordships observe that this allegation of negligent helm action was not pleaded, and what is of more importance, that not a single question was addressed in cross-examination to the master or either of the officers or to the fisherman pilot suggesting that any such helm action had been taken. The second officer in the stern had a foot on the runway where the rudder chain and rods pass: and had to move his foot when the helm was ported just before the collision. He as well as other persons on deck could have spoken to the helm action suggested. The officers all spoke to the ship being fairly centred, and spoke only of the porting to avoid the collision. In these circumstances it appears to their Lordships wrong to impute to a navigating officer of experience or indeed to any navigator a specific negligent act of commission, when his opponents, having him in the witness box, have not suggested either to him or to his witnesses that he did the act complained of. For these reasons inasmuch as the decision is based entirely upon the finding of a specific act of negligence which was not pleaded, and not investigated at the trial, their Lordships are of opinion that the decision below cannot stand. Faced with the difficulty, counsel for the respondents argued strenuously before their Lordships that the finding was quite unnecessary. This was a case, he said, where a vessel in full daylight ran into a stationary object as it might have into a vessel at anchor: and in such circumstances there was a presumption in fact of negligence from which the onus was on the defendant to clear himself.

He cited the well known cases of *The City of Peking* (1889) 14 App. Cas. 40, and *The Merchant Prince*, [1892] P. 179. The answer to this is that such was not the case made in the pleadings or at the trial nor is there a trace of it in the judgments. If the case had been made the evidence might have been added to, and there might well have been further consideration of the effect of the current to northward, the existence of which the trial Judge found, though the President thought it of little importance. Having fought the case on specific allegations of negligence it is too late to invite this Board to decide the case upon a different allegation upon which their Lordships have not the

assistance of the findings of either of the Courts in the Dominion. For these reasons the appeal must be allowed, the judgments of the Exchequer Court affirming the decree of the local Judge in admiralty should be set aside and the action should be dismissed. The plaintiff must pay the costs of the appeal to the Exchequer Court and to His Majesty in Council and the costs of the action, save in so far as they have been increased by the costs of the issue raised by apra. 21 of the defence, which costs must be paid by the defendants to the plaintiffs with a set-off of costs. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors: *Richards, Butler & Co.; Hill, Dickinson & Co.*

[*There is no page 32*]

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[33]

STRAITS SETTLEMENTS REPORTS

PUBLISHED BY AUTHORITY

BASAPAH v. NARAYANAN CHETTIAR & ORS.

[O.C.J. (Terrell J.) October 7, 1935]

[Singapore Originating Summons No. 48 of 1934]

Action by surety to administration bond against the administrator.

An administrator of an intestate's estate who has cleared the estate is in the same position towards the next-of-kin as an executor is towards a residuary legatee. His liability as administrator only ceases when he has transferred the property to someone who can give him a proper discharge. Sureties to an administration bond are liable to see to the proper distribution of the assets of the estate amongst the persons who are entitled thereto or can give a valid receipt therefor. If the administrator does not pay over the assets of the estate to a person or persons able to give him a proper discharge the sureties to the administration bond will *prima facie* be liable in an action brought by an infant beneficiary when he comes of age.

When the grant of administration is made to a person as attorney of, e.g. a widow, the administrator cannot obtain a proper discharge for the assets of the testator's estate by merely handing over the assets to his principal; such principal not being herself an administrator but merely a person who may be entitled to apply for letters of administration. This is so even if the widow is a Hindu widow and under the laws of the country of domicile of the deceased no representation is ever taken out in respect of the property of a Hindu joint family. The Court has however a discretion to allow the administrator to hand over all the assets to such a person and if the Court makes an order allowing him to do so the administrator is protected; but the administrator is not protected if he makes such a payment to such a person without authorisation from the Court.

ORIGINATING SUMMONS.

Walters and *Hoalim* for the plaintiff.

Roland Braddell and *Mundell* for the 1st defendant.

Mundell for the 2nd defendant.

Koek for the 3rd defendant.

Cur. Adv. Vult.

The facts and arguments sufficiently appear from the judgment.

Terrell, J.: M. A. R. M. Saminathan Chettiar died in India on the 15th July, 1925 possessed of considerable property in Singapore. He left two widows, Seethai Achi, the second defendant, and Kaveri Achi, and an infant son by Seethai Achi, Soman, who is the third defendant, and appears by his guardian *ad litem*. Letters of administration to the estate of the deceased were first granted to an attorney of the widow, Kaveri Achi in Probate 170 of 1927. Thereupon the first defendant as the attorney of Seethai Achi, the other widow, took proceedings for revocation of the grant made to Kaveri Achi's attorney. The disputes were referred to arbitration and the arbitrators awarded Kaveri Achi the sum of $540,000. This sum having been paid on the 17th October, 1927, the grant to Kaveri Achi's attorney was revoked, and in due course the first defendant petitioned for letters of administration as Seethai's attorney. Letters of administration were granted to him on the 27th January, 1928 and such letters of administration were issued on the 8th February, 1928. The sureties to the administration bond were the 4th defendant and the plaintiff and the amount of the bond was $300,000.

The estate of the deceased consisted of a share in the firm of A.R.A.M. There was litigation between Mootoo Carupen, one of the partners and Seethai Achi (Suit No. 868 of 1928), but in the end terms of compromise were arranged and approved by the Court by an order dated the 3rd October, 1928. This order particularly recites that the compromise was for the benefit of the infant son of the deceased, the third defendant (therein described as M.A.R.M. Saminathan Chettiar). The first defendant represented Seethai Achi in these proceedings and as a result of the compromise the first defendant received as the deceased's share in the firm of A.R.A.M. the sum of $908,554.34. The division of the partnership assets was duly approved by order of Court dated 11th January, 1929 made in Suit No. 868 of 1928. Shortly afterwards those assets were employed in a new firm carried on, under the vallasam A.R.S.A.R. Seethai Achi, by the first defendant as the attorney of Seethai Achi under a power of attorney dated the 4th February, 1929.

The first defendant accounted to Seethai Achi and obtained a full discharge from her dated the 1st March, 1931.

On the 21st April, 1934 the plaintiff as one of the sureties to the administration bond commenced these proceedings asking for administration of the estate of the deceased by the Court. It appears from the affidavit in support of the application that his co-surety, Ong Kah Lock would be unlikely to meet his obligations under the bond and that any claim upon the bond would therefore fall solely on the plaintiff. He alleges that the release by Seethai Achi was not valid and that the estate was not administered according to law.

Originally only the first defendant was made a respondent to the originating summons and numerous affidavits were filed on both sides in which various allegations were made by the plaintiff, one relating to the payment to Kaveri Achi before the date of the grant of letters of administration to the first defendant and others relating to his management of the firm of A.R.S.A.R. after he had handed over the assets of the deceased's estate to Seethai Achi. I need not refer to